

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 12, 2009 Session

**KAMARJAH GORDON, DECEASED, BY AND THROUGH HER NEXT OF
KIN, TOSHA GORDON AND TOSHA GORDON, INDIVIDUALLY v.
JEFFREY D. DRAUGHN, M.D.; TENNESSEE WOMAN'S CARE, P.C.;
AND HCA HEALTH SERVICES OF TENNESSEE D/B/A CENTENNIAL
MEDICAL CENTER**

**Appeal from the Circuit Court for Davidson County
No. 06C-778 Barbara N. Haynes, Judge**

No. M2008-02224-COA-R10-CV - Filed June 16, 2009

The parents of a deceased child and the mother's trustee in bankruptcy appeal rulings of the trial court in this medical malpractice and wrongful death action which (1) found that the mother was judicially estopped from pursuing the action; (2) denied the father's motion to substitute as plaintiff; and (3) limited the bankruptcy trustee's recoverable damages to the amount of debts listed on the mother's bankruptcy petition. Finding that the mother was not judicially estopped from pursuing her claims and that the trustee in bankruptcy succeeded to her claims, we reverse the trial court's dismissal of her medical malpractice claim and the limitation of recoverable damages on the wrongful death claim. Further, we reverse the trial court's holding that father's action is barred by the statute of limitations, vacate the denial of the father's motion to substitute and remand the case to allow the father to file a motion to intervene and intervening complaint.

**Tenn. R. App. P. 10 for an Extraordinary Appeal; Judgment of the Circuit Court Reversed
and Remanded**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which ANDY D. BENNETT, J., and ROBERT W. WEDEMEYER, Sp. J., joined.

Caroll C. Johnson, III and Timothy R. Holton, Memphis, Tennessee, for the appellants, Kamarjah Gordon, deceased, by and through her next of kin, Tosha Gordon and Tosha Gordon, individually; Special Counsel for United States Bankruptcy Trustee; and Shannon Gordon.

Noel F. Stahl and Jeffrey Zager, Dixie Cooper and Chris J. Tardio, Nashville, Tennessee, for the appellees, Jeffrey D. Draughn, M.D. and Tennessee Women's Care, P.C., and HCA Health Services of Tennessee, Inc. d/b/a Centennial Medical Center.

OPINION

I. Factual and Procedural History¹

Tosha Gordon, an expectant mother, was a patient of Dr. Amanda Adler; Ms. Gordon's regularly scheduled appointment with Dr. Adler for April 7, 2005, was canceled by Dr. Adler. On April 10 Ms. Gordon presented to Greenview Hospital Emergency Room ("Greenview") with elevated blood pressure and was told by medical personnel to contact Vanderbilt University Medical Center ("Vanderbilt"). It is alleged that Ms. Gordon contacted Vanderbilt and was instructed to follow up with Dr. Adler the next day.

Ms. Gordon presented to Centennial Medical Center Emergency Room later that day with complaints of headache, elevated blood pressure, and swollen feet; she was evaluated and diagnosed with pregnancy induced hypertension. She was transferred to the Women's Hospital at Centennial for a twenty-three hour observation period but was discharged prior to the expiration of the observation period. Ms. Gordon returned to Greenview on April 10, where fetal monitoring revealed fetal bradycardia; an emergency cesarean section was performed and Ms. Gordon's child, Kamarjah Gordon, was born on April 11, but did not survive.

On October 13, 2005, Ms. Gordon filed a petition for bankruptcy under Chapter 7 of the United States Bankruptcy Code *pro se*.² As part of the application, Ms. Gordon filled out a schedule of personal property and was asked to list "other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims." Ms. Gordon marked "none." On February 17, 2006, Ms. Gordon was granted a discharge.

On March 28, 2006, Ms. Gordon filed suit for medical malpractice and to recover for the wrongful death of her child against Dr. Jeffrey Draughn; Women's Health Group of Nashville, P.C.;³ Centennial Medical Center and Women's Hospital at Centennial Medical Center ("Centennial"); Vanderbilt; Dr. Adler; and Greenview. She filed the suit individually and as next of kin of Kamarjah Gordon.

On April 11, 2008, Dr. Draughn and TWC filed a motion for summary judgment, and asserted that Ms. Gordon lacked "standing to pursue the claims asserted in [the complaint], such standing resting exclusively with the bankruptcy trustee" or, alternatively, that Ms. Gordon was "judicially estopped from pursuing [the] action, having failed to list the claims in her bankruptcy." Shortly thereafter, Centennial filed its summary judgment motion, which incorporated by reference the April 11 motion and all its supporting documentation.

¹ The underlying facts of this case are gleaned from the complaint.

² Ms. Gordon stated in an affidavit that she could not afford a lawyer and used the "We the People" legal document preparation service to file her bankruptcy petition.

³ Women's Health Group of Nashville, P.C., was incorrectly named as a defendant in the original complaint; amended complaint was filed on February 6, 2007, to correctly list it as Tennessee Women's Care, P.C. ("TWC").

On May 16 the bankruptcy court, upon motion of the trustee, ordered that Ms. Gordon's case be reopened. In her amended bankruptcy petition, Ms. Gordon listed a "[m]edical malpractice claim for death of child" on the schedule of personal property. The bankruptcy court subsequently entered an order providing that "Timothy R. Holton is authorized to represent the trustee as special counsel with respect to a state court malpractice action."

Shannon Gordon, the natural father of Kamarjah Gordon, had moved to be substituted as plaintiff on April 18 and on July 10 the bankruptcy trustee moved to be substituted as plaintiff "to carry out the orders of the bankruptcy court," which were "to administer any assets or causes of action." Dr. Draughn, TWC, and Centennial (hereafter collectively referred to as "Appellees") filed responses in opposition to both motions for substitution.

The trial court heard Appellees' motion for summary judgment and Mr. Gordon's and the bankruptcy trustee's motions to substitute as plaintiff and entered an order granting Appellees' motion, dismissing Ms. Gordon as plaintiff and "all claims previously asserted by [her] individually." The order denied Mr. Gordon's motion to substitute because the motion was filed beyond the Tennessee Medical Malpractice Act's one year statute of limitations and three year statute of repose. Lastly, the order granted the bankruptcy trustee's motion to substitute "for the purpose of pursuing the claim for the wrongful death of [the child]"; however, the court found that "judicial estoppel applicable in this case" and limited the amount of recoverable damages to \$6,883.69, the total amount of the debts listed in the bankruptcy petition.

Ms. Gordon, Mr. Gordon, and the bankruptcy trustee (hereafter collectively referred to as "Appellants") subsequently filed a Rule 9, Tenn. R. App. P., motion for an interlocutory appeal, which the trial court denied. Appellants then filed for a Rule 10, Tenn. R. App. P., application for extraordinary appeal to this Court, which was granted.

II. Statement of the Issues

In their brief on appeal, Appellants raise the following issues:

1. Whether the trial court properly granted summary judgment on the basis of judicial estoppel.
2. Whether the trial court properly denied the motion of Mr. Gordon to be substituted as plaintiff in the wrongful death action.
3. Whether the trial court properly limited the bankruptcy trustee's recoverable damages in this case.

In their brief on appeal, Appellees raise the following issue:

1. Whether the trial court erred in granting substitution of the bankruptcy trustee as the plaintiff.

As a threshold matter, we must determine which issues are properly before this Court for review. In *Heatherly v. Merrimack Mut. Fire Ins. Co.*, 43 S.W.3d 911 (Tenn. Ct. App. 2000), this Court addressed the scope of an appellate court's review of issues raised in an extraordinary appeal:

The scope of the issues raised on Tenn. R. App. P. 9 and 10 appeals differs from the scope of the issues that can be raised on appeals as of right under Tenn. R. App. P. 3. Subject to the limitations in Tenn. R. App. P. 3(e) and 13(b), both the appellant and the appellee have broad latitude with regard to the issues they can raise on a direct appeal. The same is not the case for interlocutory appeals under Tenn. R. App. P. 9 or extraordinary appeals under Tenn. R. App. P. 10. For interlocutory appeals, the only issues that can be raised are those certified in the trial court's order granting permission to seek an interlocutory appeal and in the appellate court's order granting the interlocutory appeal. For extraordinary appeals, the issues are limited to those specified in this court's order granting the extraordinary appeal.

Id. at 914 (internal citations omitted).

In their application for extraordinary appeal, Appellants' "Question Presented for Review" addressed only the trial court's limitation of the bankruptcy trustee's recoverable damages. This Court's order granting the extraordinary appeal did not specify the issues to be decided on appeal. In their brief submitted after this Court granted the application, Appellants raised two additional issues regarding the trial court's finding that Ms. Gordon was judicially estopped from pursuing her individual claim and the denial of Mr. Gordon's motion to substitute as plaintiff.⁴ In their brief filed after the application was granted, Appellees did not dispute the additional issues raised and briefed all three issues. We find it appropriate to consider all issues raised since the order granting the extraordinary appeal did not specify the issues to be resolved by this appeal and the parties addressed all three issues. *See Heatherly*, 43 S.W.3d at 914.

III. Analysis

Summary judgment is appropriate where a party establishes that there is no genuine issue as to any material fact and that a judgment may be rendered as a matter of law, *see* Tenn. R. Civ. P. 56.04; *Stoval v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003), and should be granted at the trial court level when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn.2002); *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W. 3d 265, 269 (Tenn. 2001). To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim. *Cherry v. Williams*, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000). Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1977).

⁴ These issues were addressed in Appellants' application for extraordinary appeal as reasons for granting the application, but were not raised as "questions presented for review," as required by Rule 10(c), Tenn. R. App. P.

Neither party to this appeal asserts that there is a dispute as to any material fact; therefore, our review will focus upon whether the Appellees were entitled to summary judgment as a matter of law.

The trial court's August 1, 2008, order does not make any findings of fact or offer any reasons for rendering its decisions.⁵ Therefore, as a preliminary matter, we must examine the order to determine the effect it had on the parties and the causes of action. The trial court's order found, in part pertinent, as follows:

1) Defendants' Motion for Summary Judgment

The Court finds that there are no genuine issues [sic] of material fact and that the defendants are entitled to judgment in their favor with respect to whether the named plaintiff, Tosha Gordon, may pursue the claims asserted in this case. [Ms. Gordon] does not dispute and this Court finds that she lacks standing to pursue the claims asserted in this case. The Court further finds that [Ms. Gordon] is judicially estopped from pursuing the claims asserted [sic] in this case. Accordingly, [Appellees'] motions for summary judgment are hereby granted with respect to the dismissal of [Ms. Gordon] as the plaintiff in this case and further with respect to the dismissal of all claims previously asserted by [Ms. Gordon] individually.

2) Shannon Gordon's Motion To Be Substituted As A Plaintiff

The Court finds that the motion to substitute [Mr. Gordon] as a plaintiff was filed beyond both the medical malpractice statute's one-year statute of limitations and its three-year statute of repose, T.C.A. § 29-16-116. The Court further finds that neither [Ms. Gordon] nor [Mr. Gordon] has offered, nor is there in the record, any evidence of a mistake in the failure to name [Mr. Gordon] as a plaintiff when this action originally was filed.

3) Bankruptcy Trustee's Motion To Be Substituted As A Plaintiff

The bankruptcy trustee's motion to be substituted as a plaintiff is granted. The trustee shall be substituted as the named plaintiff for the purpose of pursuing the claim for the wrongful death of [the child], deceased. However, this Court finds that judicial estoppel is applicable to this case and therefore concludes that any monetary recovery in this case shall be limited to the amount of the claims of the creditors in [Ms. Gordon's] bankruptcy, plus the cost reasonably incurred by the trustee to recover such amount.

The order acknowledged that Ms. Gordon did not dispute her lack of standing and, in the memorandum filed in opposition to summary judgment and in her brief on appeal, Ms. Gordon

⁵ A transcript of the hearing on the motion for summary judgment and on the motions to substitute was not included in the record.

argued that “[e]ven if [she] lacked standing, this does not require dismissal” of the claims. A debtor’s standing to pursue a cause of action after filing for bankruptcy was discussed by this Court in *Headrick v. Bradley County Mem’l Hosp.*, 208 S.W.3d 395 (Tenn. Ct. App. 2006), which held that:

Under the United States Bankruptcy Code, when a debtor files a bankruptcy petition, a bankruptcy estate is created which includes all of the debtor’s legal or equitable interests in property as of the commencement of the case. These interests in property include causes of action. Upon the appointment of a trustee in bankruptcy, the trustee succeeds to all causes of action formerly held by the debtor, and the debtor lacks standing to pursue those causes of action.

Id. at 399 (internal citations omitted); *see Tangwall v. Stapleton*, 2002 WL 1723692, at *2 (Tenn. Ct. App. July 25, 2002) (holding that “[o]nly the Chapter 7 trustee, and not the debtor, has standing to pursue any pre-petition cause of action, unless the trustee has formally abandoned it”). Thus, the trial court did not err in finding that Ms. Gordon lacked standing since her claims accrued prior to the filing of her bankruptcy petition and the bankruptcy trustee “succeed[ed] to all causes of action formerly held by” her, *Headrick*, 208 S.W.3d at 399, and since Ms. Gordon conceded her lack of standing. The effect of this holding was that Ms. Gordon was dismissed as a plaintiff from the proceedings.

Next, the trial court found that Ms. Gordon was judicially estopped from pursuing the “individual” claims she alleged in her complaint. As stated earlier, Ms. Gordon alleged a claim for medical malpractice, on her own behalf, and a claim for wrongful death, as next of kin on behalf of her child. As such, the trial court’s holding in this regard had the effect of dismissing Ms. Gordon’s individual medical malpractice claim, but not the wrongful death claim, which was not a claim “individually” pursued by her.

The trial court next held that Mr. Gordon was barred from substituting as plaintiff because the substitution would have occurred outside the Medical Malpractice Act’s statute of limitations and statute of repose. The effect of this ruling was that Mr. Gordon could not substitute as plaintiff and pursue the claim for medical malpractice/wrongful death brought by Ms. Gordon, as next of kin on behalf of their child.

Lastly, the trial court granted the bankruptcy trustee’s motion to substitute as plaintiff to pursue only the wrongful death action. We surmise that the trial court did not allow the bankruptcy trustee to pursue Ms. Gordon’s individual medical malpractice claim because she was judicially estopped from pursuing it, whereas no such bar was placed on the wrongful death action. Furthermore, despite the fact that the court did not judicially estop the pursuit of the wrongful death action, it did apply the doctrine to the wrongful death action to limit the damages recoverable on the claim to the amount of Ms. Gordon’s debts.

A. Judicial Estoppel

Appellants contend that the trial court erred in finding that Ms. Gordon was judicially estopped from pursuing her medical malpractice claim and that the bankruptcy trustee was judicially

estopped from recovering damages in excess of Ms. Gordon's debts in the wrongful death suit. Appellees assert that the trial court erred in granting the bankruptcy trustee's motion to substitute as plaintiff because the trustee was judicially estopped from pursuing any of Ms. Gordon's causes of action.

1. Ms. Gordon's Medical Malpractice Claim

The doctrine of judicial estoppel provides that "a party will not be permitted to take a position that is directly contrary to or inconsistent with a position previously taken by the party where the party had or was chargeable with full knowledge of the facts and where the conduct would prejudice another." *Guzman v. Alvares*, 205 S.W.3d 375, 382 (Tenn. 2006) (citing *Marcus v. Marcus*, 993 S.W.2d 596, 602 (Tenn. 1999)). "The term 'judicial estoppel'...indicates particularly that class of estoppels arising from sworn statements made in the course of judicial proceedings, generally in a former litigation." *Sartain v. Dixie Coal & Iron Co.*, 266 S.W. 313, 316 (Tenn. 1924).

The doctrine of judicial estoppel, and an exception thereto, were discussed by the Tennessee Supreme Court in *Sartain v. Dixie Coal & Iron Co.*, 266 S.W. 313 (Tenn. 1924), which held:

The Tennessee law of judicial estoppel...has nothing to do with other parties to the suit; nor does it matter whether they even knew of the sworn statement. It is...based solely upon that public policy which upholds the sanctity of an oath, and precludes a party who has made a sworn statement - - even in another litigation - - from repudiating the same when he thinks it to his advantage to do so.

While the appellate courts of Tennessee have...upheld and preserved the sanctity of an oath by the application of this principle, yet, in order to avoid injustice, the severity of the rule has been tempered by this exception, viz.: If the party sought to be estopped can show that his previous statement under oath was made inadvertently or through mistake...he will not be precluded by his former statement.

Id. at 317-18; see *D.M. Rose & Co. v. Snyder*, 206 S.W.2d 897, 906 (Tenn. 1947) (holding that "[w]hile judicial estoppel applies where there is no explanation of the previous contradictory sworn statement, it does not apply where there is an explanation showing such statement was inadvertent, inconsiderate, mistaken, or anything short of a 'willfully false' statement of fact") (internal citations omitted). "Anything short of 'conscious and deliberate perjury' is insufficient to give rise to the doctrine of judicial estoppel." *Echols v. Echols*, 2007 WL 1756711, at *3 (Tenn. Ct. App. June 19, 2007) (citing *State ex rel. Scott v. Brown*, 937 S.W.2d 934, 936 (Tenn. Ct. App. 1996)). "A trial court's application of the doctrine of judicial estoppel presents a question of law." *Frazier v. Pomeroy*, 2006 WL 3542534, at *10 (Tenn. Ct. App. 2006).

In their motion for summary judgment, Appellees argued that Ms. Gordon was judicially estopped from pursuing the claims alleged in her complaint "because she did not disclose the existence of her medical malpractice/wrongful death claims in her bankruptcy." Specifically, they asserted that, "at the time [Ms. Gordon] filed her voluntary chapter 7 bankruptcy petition, [she] possessed and knew of the medical malpractice/wrongful death claims which she asserts in this action"; that "[d]espite this, she did not list these claims as an asset and the bankruptcy court

thereafter granted her a discharge”; and that the present suit was filed “[a] mere six (6) weeks” after her discharge. In support of these assertions, Appellees attached to their motion for summary judgment a portion of Ms. Gordon’s deposition which discussed her knowledge of the cause of action shortly after her child’s death;⁶ letters sent by Ms. Gordon’s attorneys seeking the release of her medical records, dated prior to the filing of the bankruptcy petition;⁷ and Ms. Gordon’s original bankruptcy petition which did not list the medical malpractice claim.

In her memorandum opposing the summary judgment motion, Ms. Gordon asserted that “the doctrine of judicial estoppel should not be applied” because “her failure to list [the] claim in her bankruptcy petition was a mistake and not a willfully false statement” and “no unfair advantage [was] gained because Ms. Gordon’s bankruptcy case [was] reopened, th[e] claim [was] listed, and the bankruptcy trustee [was] involved.” In support of this assertion, Ms. Gordon attached an affidavit she originally executed and submitted to the bankruptcy court in support of her request to have her case re-opened;⁸ the bankruptcy court’s order allowing for the case to be re-opened; and her amended petition, which listed the medical malpractice cause of action. Ms. Gordon also filed a

⁶ The transcript of Ms. Gordon’s deposition provided by Appellees states, in part pertinent, as follows:

A. I seeked [sic] - - as far as getting a lawyer, talking to a lawyer.

Q. All right. When did you do that?

A. Actually, I don’t have actually the date when I did that.

Q. Okay. And how soon after the - - the delivery was that?

A. I don’t know. I’m not for sure [sic].

Q. Was it within a matter of weeks or months, a couple months?

A. I’m going to say about - - maybe about a month.

Q. And you have continued to feel since that time as though somebody didn’t...do their job?

A. Yes. And I still feel someone didn’t do their job.

Q. And you felt that way ever since April 10th and 11th, 2005?

A. Well, April 10th and 11th, I wasn’t corhenant [sic] as far as I was still up under sedation. But after I got home, yes, and I still feel that way today.

⁷ The first letter, dated May 11, 2005, was sent by Andrea W. Smith, medical records coordinator at Branham & Day P.C., on behalf of Attorney John Day and the second letter, dated January 27, 2006, was sent by Tim Holton, her current attorney. Both letters were sent to Vanderbilt.

⁸ Ms. Gordon’s affidavit stated that:

I...hereby state that my child died shortly after birth on April 11, 2005. Soon thereafter I met with an attorney in Nashville, Tennessee regarding a potential medical malpractice case. It was my understanding from that attorney that I did not have a case. I filed Chapter 7 bankruptcy without hiring an attorney on October 13, 2005. I did not believe I could afford an attorney at that time, and used the bankruptcy petition preparation service of “We the People.” Because it was my understanding that I did not have a medical malpractice case and did not have bankruptcy legal advice in the preparation of my petition, I did not know that I needed to list the potential medical malpractice claim in my bankruptcy petition.

“Response to Rule 56.03 Statement of Undisputed Facts in Support of [Appellees’] Motion for Summary Judgment.”⁹

The trial court made no finding as to whether the omission of the medical malpractice claim from the bankruptcy petition was a “willfully false statement of fact” and simply ruled that Ms. Gordon was judicially estopped from pursuing the claim. Since the trial court applied judicial estoppel, however, it is apparent that the court did not find the omission of the medical malpractice claim from Ms. Gordon’s bankruptcy petition to be “made inadvertently or through mistake.” We do not agree. While Ms. Gordon’s failure to include the medical malpractice claim in her bankruptcy petition could constitute a basis for applying judicial estoppel, there is no proof that the omission was “willfully false,” *D.M. Rose & Co.*, 206 S.W.2d at 906, or an act of “conscious and deliberate perjury.” *Echols*, 2007 WL 1756711, at *3. To the contrary, her affidavit stated that, at the time she filed her bankruptcy petition, she did not believe that she had a viable cause of action and that she did not understand the need to include the medical malpractice claim in the petition. Appellees filed nothing to counter these facts. Moreover, her responses to the Statement of Undisputed Facts disputed the statements that she knew of the potential medical malpractice claim shortly after the death of the child and that she had retained counsel to prosecute the malpractice claim prior to her discharge in bankruptcy. The record shows that Ms. Gordon did not know she had a viable medical malpractice claim and did not understand the ramifications of omitting the malpractice claim from the bankruptcy petition; further, there is no proof of any nefarious motive on her part in omitting the claim from her petition. Her failure to amend her bankruptcy petition to include the medical malpractice claim once the complaint was filed does not change the fact that the omission of the medical malpractice claim from the original bankruptcy petition, at the time the petition was filed,

⁹ Ms. Gordon’s responses to the Statement of Undisputed Facts, in part pertinent, included the following:

2. [Ms. Gordon] knew that she had a potential medical malpractice claim against the defendants...and consulted with legal counsel regarding such a claim approximately one (1) month following the alleged medical negligence...

Response: Disputed as stated. Ms. Gordon testified someone should have done something to save her baby. Ms. Gordon did consult an attorney regarding a possible malpractice action but understood the attorney to advise her that she did not have a case.

6. [Ms. Gordon’s] current counsel in this case had been retained to prosecute her medical negligence claim and had requested medical records on her behalf before her discharge in bankruptcy...

Response: Disputed that counsel had agreed to prosecute case as of date of letter. Before counsel could prosecute case it was necessary to investigate, and that was the purpose of the letter requesting medical records.

7. [Ms. Gordon] did not amend her bankruptcy schedules to include her claims against [Appellees] at any time prior to her discharge...

Response: The schedules were not amended before an order of discharge was originally entered. But, the bankruptcy case has been reopened and the schedules amended...

was a mistake.¹⁰ Consequently, we reverse the trial court's application of judicial estoppel to the medical malpractice and wrongful death claims.

2. Bankruptcy Trustee's Motion to Substitute and Limitation of Recoverable Damages

Appellees assert that, since the trial court judicially estopped Ms. Gordon from pursuing the claims alleged in her complaint, the estoppel should apply to the bankruptcy trustee as well and, therefore, his motion to substitute as plaintiff should have been denied. Appellants assert that the trial court erred in limiting the bankruptcy trustee's recoverable damages for the wrongful death claim since Ms. Gordon fell within an exception to judicial estoppel and, therefore, the doctrine should not apply.

We find these two remaining issues to be pretermitted by our determination that the trial court erred in applying judicial estoppel to the medical malpractice and wrongful death claims. The bankruptcy trustee's motion to substitute was properly granted as he succeeds to Ms. Gordon's cause of action and has the standing that she no longer possesses. *See* Tenn. R. Civ. Proc. 25.03. Furthermore, as successor to Ms. Gordon's interest, the bankruptcy trustee is permitted to pursue both the wrongful death and medical malpractice claims. As such, the limitation of the bankruptcy trustee's recoverable damages to the amount of Ms. Gordon's debts is improper.¹¹

B. Mr. Gordon's Motion to Substitute

Appellants assert that the trial court erred in denying Mr. Gordon's motion to substitute as plaintiff in the wrongful death action on the grounds that it was time-barred because Rule 17, Tenn. R. Civ. P., allows for a real party in interest to substitute in for an improper plaintiff and for the substituted party's suit to relate back to the original filing date to avoid statute of limitation issues. Appellees assert that "the relation back provision of Rule 17.01 is . . . limited to instances in which there has been a bona fide mistake as to the identity of the proper plaintiff."

¹⁰ Appellees cite to cases from other jurisdictions where a debtor was deemed to have acted in bad faith when attempting to amend a bankruptcy petition only after the omission of a cause of action was discovered. However, this Court believes that the determination into whether Ms. Gordon's omission of the medical malpractice claim from her bankruptcy petition was "inadvertent, inconsiderate, mistaken, or anything short of a 'willfully false' statement of fact," *D.M. Rose & Co.*, 206 S.W.2d at 906, should focus on the facts present and known at the time Ms. Gordon filed her bankruptcy petition which, as aforesaid, was filed *pro se*. When the failure to include the cause of action in her original bankruptcy filing was brought to her attention in April 2008, her counsel took prompt measures to reopen the bankruptcy case.

¹¹ Assuming, *arguendo*, that judicial estoppel was appropriately applied in this matter, we do not find Appellees' argument in support of limiting the amount of recoverable damages based on the doctrine to be persuasive. Appellees cite to a number of cases outside this Court's jurisdiction, which either discussed or imposed a limitation on a bankruptcy trustee's recoverable damages based on judicial estoppel grounds, but did so as a way to punish a debtor who would have been judicially estopped from pursuing the claims and who had acted in bad faith. The present case is distinguishable in that the trial court did not apply judicial estoppel to prevent Ms. Gordon from pursuing the wrongful death claim and Ms. Gordon did not act in bad faith in omitting it from her bankruptcy petition.

While Rule 17 provides that “[e]very action shall be prosecuted by the real party in interest,” substitution of parties is governed by Rule 25, Tenn. R. Civ. P., which allows for a substitution in the event of the death or incompetency of a party, transfer of an interest from a party, or a public official’s separation from office. The pleading by which Mr. Gordon sought to participate in this suit was styled “Motion for Substitution” and stated in its entirety the following: “Shannon Gordon, as natural father of Kamarajah Gordon, hereby moves to be substituted as plaintiff in this case.”¹² Thus, Mr. Gordon’s asserted interest in the pending suit was as natural father of the child,¹³ which is an interest equal to, but separate from, that of Ms. Gordon’s.¹⁴ At the time Mr. Gordon’s motion was filed this interest was protected by Ms. Gordon’s inclusion of the wrongful death claim in the original complaint, since there could only be one recovery for the wrongful death of the child.

When the bankruptcy trustee was properly permitted to substitute, as Ms. Gordon’s representative, as plaintiff in the suit, her interest in the entire action, including her rights relative to the medical malpractice and wrongful death claims, was transferred to the trustee in accordance with Rule 25.03, Tenn. R. Civ. P.¹⁵ At the time she was replaced as plaintiff by the bankruptcy trustee, she was no longer able to prosecute the entirety of the wrongful death suit,¹⁶ and Mr. Gordon had a reasonable time, pursuant to Rule 17, Tenn. R. Civ. P.,¹⁷ to join or substitute into the suit in

¹² This is not in compliance with Ruler 7.02, Tenn. R. Civ. P., which provides:

(1) An application to the court for an order shall be by motion which . . . shall state with particularity the grounds therefor and shall set forth the relief or order sought.

¹³ Although the memorandum filed in support of his motion mentions that he is the husband of Ms. Gordon, he was not named as a party in the suit and no claim derivative of Ms. Gordon’s is included therein.

¹⁴ The statute creating a cause of action for wrongful death is found at Tenn. Code Ann. § 20-5-106, which states, in part pertinent, that:

The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by the person’s death but shall pass to...the person’s natural parents or parent or next of kin if at the time of death decedent was in the custody of the natural parents or parent and had not been legally surrendered or abandoned by them...

Tenn. Code Ann. § 20-5-106(a). Thus, both natural parents have equal right to bring a cause of action for the wrongful death of a child. *Mangrum v. Owens*, 917 S.W.2d 244, 245 (Tenn. Ct. App. 1995) (holding that “[w]e find nothing in T.C.A. § 20-5-106 which suggests that the right of action for the wrongful death of a child belongs to one natural parent over the other”).

¹⁵ Rule 25.03, Tenn. R. Civ. P., allows for “the person to whom the interest is transferred to be substituted in the action or joined with the original party.” The bankruptcy trustee’s motion to substitute under Rule 25, therefore, was proper since Ms. Gordon’s interest was transferred to him.

¹⁶ The bankruptcy trustee succeeds only to the interest of Ms. Gordon, as debtor. 11 U.S.C. § 541(a)(1).

¹⁷ Rule 17 states in pertinent part that:

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification or commencement by,

(continued...)

order to protect his interest. Since the wrongful death action in which he had an interest had been timely filed, his interest was not barred by the statute of limitations.

Rule 25, however, does not expressly address Mr. Gordon's situation in this case. The rule does not grant authority for him to seek to substitute for Ms. Gordon as the real party in interest, since her individual interest in the medical malpractice action as well as her interest, as next of kin of Kamarjah Gordon, in the wrongful death action, was transferred to the trustee in bankruptcy. As a result of the trial court's ruling allowing the trustee to substitute as plaintiff, any role of Mr. Gordon in the suit could only be to protect his separate interest. At that point the appropriate way to proceed would be pursuant to Rule 24.01, Tenn. R. Civ. P., which would allow him to more completely assert his interest in the action and pursue his separate rights as natural father of the child.¹⁸

Consequently, we reverse the trial court's holding that father's action is barred by the statute of limitations and vacate the denial of the father's motion to substitute. We remand the case to allow the father to file a motion to intervene and intervening complaint.

IV. Conclusion

For the reasons set forth above, the decision of the Circuit Court is reversed and the case remanded for further proceedings in accordance with this opinion. Costs of this appeal are assessed against Appellees, equally, for which execution may issue if necessary.

RICHARD H. DINKINS, JUDGE

¹⁷(...continued)

or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

¹⁸ We do not fault Mr. Gordon for seeking to substitute as plaintiff in this case since, at the time his motion was filed, Ms. Gordon's bankruptcy proceeding had not been reopened and no trustee appointed.